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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

v.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

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Defendant in error now seeks to repudiate its own complaint and the averments found therein, pleading its alleged ownership of a certain vein or lode underneath the surface owned by plaintiff in error, the latter's wrongful entry and trespass thereon, and the damage alleged by such trespass and conversion of the ores found in such vein. Notwithstanding these were all essential averments to an action for trespass and conversion, the allegation now is that the action was one solely for conversion of ore, was transitory and not local, and hence all statements in its complaint affirmatively pleading its possession and source of ownership should *now* be rejected in determining the question of jurisdiction in this court to review the judgment below.

We answer:

The original complaint (Supp. Rec., 4–5) avers that the defendants "wrongfully, unlawfully and willfully entered upon" the vein claimed by plaintiff, and concludes:

> "Wherefore plaintiff prays judgment against said defendants for said sum of $200,000, *damages sustained by reason of the trespass aforesaid,* together with its costs in this behalf expended."

Both the first and second amended and supplemental complaints (Supp. Rec., 13, and Rec., 4) aver that the defendant entered thereon "knowingly, wrongfully and unlawfully," &c., and pleads damage for the wrongful removal and conversion of the ore, &c. Each complaint averred that the defendant had removed and was *continuing* to remove the ores, &c.

It is hence clear that the action was treated as a continuing trespass. In its original decision in this case (102 Fed. Rep., 430), Appendix to Brief, pages 8 and 9, that court so expressly rules, with citation of authorities. In the brief of defendant in error filed in that court in this cause, at page 14, there is the express statement that—

> *"The action is one of trespass on real estate and for damages resulting from the trespass. And the complaint in such an action would be similar to one in ejectment."*

And this is followed by citations of the Montana Code and decisions of its Supreme Court thereunder, with others, to fortify such contention.

And Mr. Lindley, in his work on Mines, second edition, volume 2, section 865, states in concise language the general practice in cases of this kind throughout the mining States thus:

> "SEC. 865. INTRODUCTORY.—In the mining regions of the West the action of trespass is largely utilized, not only for the purpose of recovering damages

> for the unlawful extraction of ore, but also to try the title itself, for, as a rule, the title to the property or some portion of it is involved in the litigation. The frequency with which this class of actions is encountered in the reports of the mining States is due to that feature of the Federal law which permits the owner of a mine or mining claim holding within his surface boundaries the apex of a vein, to pursue such vein under certain conditions, into and underneath the land adjoining. So while the action is in form trespass *quare clausum fregit*, the issues naturally arising are those of ownership of the segment of the vein in dispute, and title is necessarily brought into question. The 'law of the apex' is responsible for nine-tenths of the expensive litigation arising in the conduct of quartz or vein mining, and out of it have grown several interesting and novel questions. The rules governing the action in the case of underground invasion are the same, generally speaking, as where a surface trespass is committed. There are, however, certain elements in cases of underground trespasses deserving of special consideration."

Manifestly, then, plaintiff sued in trespass. Its subsequent amendments did not change the nature of its cause of action. The law of Montana provides:

> "That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with the special enactments of this Territory, shall be the law and the rule of decision, and shall be considered of full force until repealed by legislative authority."
>
> *Act of June 2, 1872.*

In *Ellenwood v. Marietta Chair Co.*, 158 U. S., 105, 107, this court held:

> "By the law of England, and those of the States of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like

an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the State in which the land lies *(Livingston v. Jefferson,* 1 Brock., 203; *McKenna v. Fisk,* 1 How., 241, 247; *Northern Indiana Railroad v. Michigan Central Railroad,* 15 How., 233, 242, 251; *Huntington v. Attrill,* 146 U. S., 657, 669, 670; *British South Africa Co. v. Companhia de Mocambique* (1893), App. Cas. 602; *Cragin v. Lovell,* 88 N. Y., 258; *Allin v. Connecticut River Co.,* 150 Mass., 560; *Thayer v. Brooks,* 17 Ohio, 489, 492; *Kinkead's Code Pleading,* par. 35).

"The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not *(McKenna v. Fisk,* above cited; *Williams vs. Breeden,* 1 Bos. & Pul., 329).

"But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only; and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate *(Cotton v. United States,* 11 How., 229; *Eames v. Prentice,* 8 Cush., 337; *Howe v. Willson,* 1 Denio, 181; *Dodge v. Colby,* 108 N. Y., 445; *Merriman v. McCormick Co.,* 86 Wisconsin, 142). The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio."

In *Stone v. United States,* 167 U. S., 178, cited in support of the pending motion, the conversion was *complete*

and the suit was to recover the value of the timber manufactured or lumber and ties taken. Hence the court held the action transitory. Here the complaint and each amendment thereto averred the continuing trespass and conversion, a condition precisely analogous to that in *Ellenwood v. Marietta Chair Co., supra.*

And such is the ancient law on which the present rule and decisions are founded; for in Third Blackstone's Commentaries, page 210, the learned commentator says:

> "Every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close;* the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit.* For every man's land is, in the eye of the law, inclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage.
>
> "One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land."

And again, page 212:

> "In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle), the declaration may allege the injury to have been committed by *continuation* from one given day to another (which is called laying the action with a *continuando),* and the plaintiff shall not be compelled

> to bring separate actions for every day's separate offense, but where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando;* yet, if there be repeated acts of trespass committed (as cutting down a certain number of trees) they may be laid to be done, not continually, but at divers days and times within a given period."

Hence the complaint, in present action, in averring a continuing trespass, was in exact accord with the existing and settled rule.

And in the Stone case, *supra*, the court cites with approval the language found in *Schulenberg v. Harriman*, 21 Wall., 44-64, that—

> "All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property."

The plaintiff in this action (defendant in error here) hence clearly elected to bring suit in trespass and is bound thereby. Even had the action been in trover, the averments of the complaint were in every sense proper, for in *Enc. of Pl. & Pr.*, volume 21, page 1065, title *"Trover and Conversion,"* the rule is stated thus:

> "The rule is that the plaintiff may, if he choose, without undue prolixity, allege the facts showing his ownership and right to possession." * * *

And again, page 1062:

> "It may be stated as a general rule that in an action of trover the declaration or complaint must allege that the plaintiff had at the time of the conversion a general or special property in the goods converted to the possession or right of possession."

Hence it is manifest that the plaintiff (defendant in error here), whether suing in trespass or trover, properly stated the facts which presented the concededly Federal questions on the face of its complaint, and in practical effect and with relation to the peculiar averments necessary in an apex case brought its action within the clear effect of the rule and practice stated by Mr. Lindley, *supra*. These Federal questions, which were also fully argued at the bar, are stated in our Brief at pages 4-5, 58-60, 91-95, 102, 138-153, and in "Reply Brief of Petitioner" in No. 13, original, at pages 4-7.

In actions in trespass such as this is, where extralateral rights are involved or constitute the basis of the plaintiff's action, two different cases may be presented, one where the plaintiff owns the claim beneath the surface of which the trespass has been committed, and the other where the alleged trespass has been committed beneath the surface of the claim of another—or at least outside the surface of the plaintiff's claim—but it is asserted that the vein is owned by the plaintiff by virtue of the existence of the apex thereof within his claim.

In the first case it is sufficient, in the complaint, to allege the ownership of the claim and the commission of the trespass within it (as illustrated in *Boston, etc., Mining Co. v. Montana Ore Company, infra*) without going into other matters, since the presumption is that the plaintiff, owning the surface of the claim from which the ore is taken, owns the ore beneath it, while in the second case it is the practice —and a proper and necessary one—that the plaintiff shall allege in the complaint that he owns his claim, and also the position and extent within it of the apex of the vein, having such relation to the boundaries of the claim as secure the extralateral right under the statute.

This is stating the facts upon which the right depends. Necessarily, in stating the *locus in quo* of the trespass, which must be alleged in the complaint, it is disclosed that

the alleged trespass is committed outside the surface boundaries of the plaintiff's claim, and therefore, to show his title thereto, he must allege the facts upon which the extralateral rights are based and apply the statute thereto, which being done in this case presents, in the affirmative statement of the facts constituting the plaintiff's case, the existence of the Federal questions now conceded to be presented by the complaint as it stands.

This is the universal practice in complaints of this kind, as exhibited in this case and all the apex cases in which the plaintiff bases his action on the taking of ores beyond his surface boundaries.

The rule that the plaintiff cannot, by attempted statement of the defense, *thereby* create Federal jurisdiction is inapplicable, for that is not attempted. The complaint and its amendments here are confined *solely* to the affirmative statement of the plaintiff's case, and in no sense do its allegations set forth the defendant's case. The plaintiff elected to and did sue in trespass, set out its asserted title and claim, and distinctly plead the defendant's wrongful and unlawful entry.

In *Boston, &c., Mining Co. v. Montana Ore Co.*, 188 U. S., 632, 638, cited in support of the pending motion, it was said:

> "To make out a *prima facie* case on the part of complainant, so far as its right to the ore in question is concerned, all that was necessary was to show the patent and the complainant's possession under it, and from such patent and possession the presumption would be that the complainant was the owner of all ores found within the boundaries contained in the patent extended downward into the earth, and the burden would then rest upon the defendants to show that, notwithstanding such presumption, they had the right to enter upon and take the ore from the ground within the limit described in the patent under which the complainant

derives title. It could then prove facts to sustain its averments in regard to ascertaining the quantity and value of the ores which the defendants were extracting or might extract from the complainant's premises, and that it would be altogether uncertain and indefinite as to what amount of ores or the value thereof the defendants might extract in the future, and that the complainant would be compelled to rely upon the good faith and showing of the defendants as to the amount and value of the ores which they had theretofore extracted and might thereafter extract from the premises. Indeed, the complainant asserted in the bill, an extract from which is contained in the foregoing statement, that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth, until the contrary has been shown. It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper."

But this is the exact *converse* of the case at bar. *Here* the plaintiff was not the holder of the patent title to the land. That was in the defendant (the plaintiff in error here). The contention and pleading of the plaintiff was that, notwithstanding this, the plaintiff was the owner of the ore in question because the vein wherein it was contained had its claimed apex *in part* upon *other* land which the plaintiff did own. That contention was and is its sole ground of action, and in stating it the plaintiff necessarily stated a claim based upon the Federal mining law, for apart from *that* law the plaintiff had no cause of action.

That allegation was denied in the answer (Rec., 7) and was followed by the further and separate defense of estoppel (Rec., 8). Manifestly this raised an issue upon plaintiff's own statement of its own case as one arising under and dependent for its maintenance upon the construction of a Federal statute as applied to the facts there pleaded by the plaintiff.

II.

For the convenience of the court we here note references to the record and our brief in connection with the several points involved and argued:

1. *The Specific Performance Case and Resulting Judgment and Deed.*

Bond for conveyance (Ex. "A," Rec., 9 and 45).

Deed thereunder (Ex. "B," Rec., 11).

Judgment-roll (Complaint, answer, findings, and judgment) (Rec., 41-54).

Assignment of errors thereon 5, 8-15 (Brief, 33, 37).

Assignments 28, 29, 30 (Brief, 44, 45).

Assignments 36, 37, 40, 41, 42, 43, 44, 45, 46, 47.

Discussion (Brief, 103-137, 153-163).

The Specific Performance case (Rec., 44) especially plead:

> "And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant, and the St. Louis Mining and Milling Company of Montana have instituted a number of suits in the Circuit Court of the United States within and for the District of Montana, in which it claims that it is the owner of the premises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by

its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; *that in order to successfully defend itself against said suits and in order to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, The St. Louis Mining and Milling Company of Montana,* it is necessary that the said defendants should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do."

The trespass suit now at bar was the suit thus referred to. The defendants denied obligation to make any deed and plead the statute of limitations. The case was tried by the court without a jury, and the findings therein (Rec., 50-52) distinctly declare, upon the evidence, that the plaintiff (The Montana Company) was the successor in interest of the obligees under the bond on which the suit was based; that said company was the assignee thereunder (Findings 7, 8, 9, Rec., 51-52); that the St. Louis Company took with notice "of the equities of the plaintiff in and to said compromise strip and its possession thereof."

As conclusions of law the court held plaintiff entitled to a conveyance of the fee, and—

"II.

"That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title, or interest *of any kind or character in or to the said compromise ground, or any part or portion thereof,* and from in any manner interfering with the possession or enjoyment thereof by plaintiff."

Rec., 52.

And the judgment (Rec., 53-54) recites "that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, *be specifically performed,*" and that the defendant execute a deed in form like the form attached to the judgment within thirty days, or, failing so to do, the clerk of the court was authorized to make the conveyance for it.

The judgment and resulting deed conclusively show that there was transferred to the plaintiff (plaintiff in error here) by such deed the entire estate of the St. Louis Company in this compromise ground by words so full, sweeping, and conclusive as to leave no possible interest in the grantor. Language could not more effectually transfer the ownership of land with all its contents, from the surface downward, than is thus here used in the judgment and the deed. Add thereto the injunctive language of the judgment, and the purpose is complete.

With notice from the complaint in the Specific Performance case that the Montana Company sought the legal title to this ground, "with all the mineral therein contained," we find the defendant in that case (The St. Louis Company) interposing no defense even hinting at any claim of apex rights *outside* the compromise ground which would give it the right to take from the compromise strip all the mineral therein contained, which was the real purpose and object of the damage suit then pending and now at bar.

Manifestly the pleadings in the Specific Performance case put in issue the right to the fee of this compromise strip "and all the mineral therein contained." The resulting judgment and deed was intended to and did vest in the Montana Company all and every right which the St. Louis Company had in that ground and the waiver of adverse claim gave the St. Louis claimant the much larger area of the controversy and which includes the apex of the vein here involved. Hence the contention it here makes was clearly matter *res adjudicata* and rendered the estoppel so made a complete bar.

The contention that the Montana Company and its predecessors in interest treated this compromise strip as Nine Hour ground is not material here. They claimed almost two acres of the St. Louis claim as applied for as Nine Hour ground and brought adverse claim and suit accordingly.

The bond for deed treated the ground included therein as both St. Louis and Nine Hour, in express words (Rec., 9-10). The obligor agreed, however, to obtain the fee from the United States and convey the compromise strip, with all its contents, to the obligees or their assigns. As against the obligor, his acceptance of patent to this ground, as part of the St. Louis claim, estopped him from asserting that it was otherwise than St. Louis territory, because that was the legal effect of the waiver and withdrawal of the adverse claim. As he is estopped to deny that result, it is manifest the Montana Company cannot be bound to the contrary, as estoppels must be mutual. The St. Louis is the fee title; the Nine Hour the possessory title. A statement in the pleadings that the compromise strip was treated as Nine Hour ground by the Montana Company is not material, because that was the basis of the adverse claim suit for the entire conflict, and as well the basis of the compromise whereon the bond for deed was given from the St. Louis claimant.

Certainly both parties intended that the legal title under the St. Louis patent should come to the obligees of the bond and their assigns. It is equally certain that the result of the compromise, whereby the Nine Hour claimants surrendered the area within their claim, many times larger than that deeded to them under the St. Louis patent, cannot now be held to defeat the legal rights of the Montana Company in this ground simply by mere use of words.

2. *Extent of Conflict Shown by Adverse Claim of Nine Hour 1.98 Acres.*

a. Record, 55-59, 65; plat of Nine Hour patent, opposite Record, page 76.

Map, Exhibit "E," Brief, opposite page 19, and note, page 19.

Assignment of error 15, Brief, 37; discussion, Brief, 125, 126.

3. *Westerly Line of Compromise Ground as Conveyed by Bond and Deed 9½ Feet West of Line Assigned to the Compromise Ground by Defendant in Error.*

The court refused to admit evidence showing the real position of the ground conveyed by the deed, which was 9½ feet west of the west line of the compromise ground, as indicated on defendant in error's maps and as fully explained at the oral argument by reference to the maps and variations in the courses between the bond and deed giving the description as it was on the application for patent when the compromise was made and the lines in the patent as finally issued. The effect was to incorrectly locate the actual position upon the ground of the compromise strip, and thus to prevent the inclusion therein of the entire apex containing all the ore in controversy here.

Record, 55; assignment of error 8, Brief, 32.

Discussion, Brief, 17 and 18 (*i* and *k*); map opposite page 19.

4. *Extralateral Rights in Apex Vein.*

Assignment of errors 4, 6, 33-37, 41-48, Brief, 30, 31, 40-42, 52-54.
Discussion, Brief, 102, 138-153.
Priority, Brief, 153-163.

5. *Complaint Does Not State a Cause of Action.*

Assignment of errors 2, Brief, 2.
Discussion, Brief, 81-96.

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